IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 63 of 1997

For Approval and Signature:
HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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M/S.PATEL ANILKUMAR BHAGWANDAS - Applicant(s)
Versus
COMMISSIONER OF INCOME-TAX - Respondent(s)

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Appearance :
MR SN SOPARKAR for Applicant(s) : 1,
MR MANISH R BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR JUSTICE R. S. GARG
and
HONOURABLE MR JUSTICE D.H. WAGHELA

Date : 04/11/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench 'C', at the instance of the assessee has made

this Reference under section 256 (1) of the Indian Income Tax Act, 1961 on the following questions for the opinion of this Court which arises out of Income Tax Appeal No.5618/Ahd/1991 pertaining to Assessment Year, 1987-88:

> ***"1. Whether, the Hon'ble Tribunal is justified in law in sustaining the addition of Rs. 94,000/- which was not the addition made by A.O in the order under section 143(3) dated 19.6.1989 and also which did not arise out of the order dated 9.9.1991 of the learned CIT (A)-V and which was not the contention of appeal by the department before the Hon'ble Tribunal ?***
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> ***2. Whether the Hon'ble Tribunal is justified in sustaining the addition of Rs.94,000/- which was never the bone of contention of either parties and also which issue was not argued by either parties before the Hon'ble Tribunal ?***
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> ***3. On the facts and circumstances of the case, whether the Hon'ble Tribunal was within its power in sustaining the addition of Rs. 94,000/- for 313 bags for want of proper explanation which was neither asked***

for nor offered and which was not warranted as per law ?"

2. The short facts necessary for disposal of the present Reference are that the assessee is a dealer in Kirana on commission basis. A search was conducted in his premises and an inventory of goods available at the shop and godown was taken. On physical verification, stock of 1,536 bags of chillies were found. According to the seizure and search survey report, the details in the accounts were relating to 1188 bags only. The Assessing Officer proposed to make certain additions. Vide his order dated 19.6.1989, he made addition of Rs. 1,04,400/- in respect of excess stock found during the course of the search.

3. Being dissatisfied with the said order, the assessee took up the matter in appeal to the C.I.T. (Appeals). The Commissioner Income Tax (Appeals), by his order dated 9.9.1991 observed that complete reconciliation of stocks of books of accounts and stock found at the time of search was filed vide

letter dated 25.5.1989, according to which the total bags of chillies were 1849 and not 1536. He also observed that as the stocks were properly explained and there was no suppression or shortfall, the Assessing Officer was not justified in making an addition of Rs. 1,04,400/-. The Revenue, being dissatisfied with the said order, filed Income Tax Appeal No.5618/Ahd/1991. The Tribunal, in the very paragraph No.1 itself has framed question for consideration in the following terms:

> ***"The learned CIT (Appeals) has erred in law and on facts in deleting addition of Rs.1,04,400/- in respect of excess stock found during the search."***

In para 4, it made an observation that the addition made by the A.O. may not be sustained as the discrepancy found at the time of search in the closing stock had been explained [see order under section 132 (5)]. The Tribunal however, further observed that the discrepancy calculated by the Assessing Officer in order under section 132(5) of

313 bags were not properly explained and, therefore, the addition of Rs. 94,000/- instead of Rs.1,04,400/- could be sustained.

4. Mr Varun Patel, learned counsel under the authority of Mr Soparkar, after taking us through the orders passed by the authorities, submitted that the whole confusion crept in because of non-understanding of the accounts. According to him, at the time of search and seizure, 1536 bags were found while the accounts were showing the available stock of 1188 bags and, therefore, there was difference of 348 bags, value of which is Rs.1,04,400/-. His further submission is that in the reconciliation, the details of 1849 bags were submitted from which the Tribunal appears to have deducted 1536 bags which were found at the time of the seizure and came to the conclusion that available stock of 313 bags was not properly explained and, therefore, the value/price of the said bags could be added. He submits that in fact, the findings of the Commissioner was that everything was properly explained and once that part of the finding is accepted, then there was no reason

to sustain addition of Rs.94,000/- which was not pertaining to the difference between the bags found at the time of the search and the statement of accounts which reflected availability of 1188 bags. He also submits that the Tribunal had made out a new case for the department that as 1849 bags were shown in the accounts and only 1536 bags were found on the spot, there was a difference of 313 bags.

5. Mr Bhatt, learned counsel for the Revenue, on the other hand, submitted that the difference in the stock whether found at the time of search and seizure or at the time of the reconciliation, ought to have been taken into consideration by the Assessing Officer/CIT (Appeals) and in any case, the Tribunal was justified in making addition of Rs.94,000/-. We have heard the parties.

6. It is not in dispute before us that at the time of search and seizure, the account position was 1188 bags, while on the spot 1536 bags were found. Undisputedly, there was difference of 348 bags, value of which was Rs.1,0-4,400/-. It is not the case of

the Department that they ever found a discrepancy of 313 bags. They came out with a specific case that the discrepancy was in relation to 348 bags.

7. In the reconciliation proceedings when the complete details of the accounts were filed by the assessee, they had explained the account position by saying that they had 1849 bags of chillies with them on the date of search and seizure and, therefore, the dispute was unjustified in saying that only 1536 bags were found on the spot. We are unable to understand that how the Tribunal could take the figure of 1849 bags reflected in the accounts and deduct out of it the 1536 bags found on the spot to come to a conclusion that there was discrepancy of 313 bags. The shortfall or non-accounting of 313 bags was never the case of the Department. Their plain, simple and specific case was that the discrepancy was in relation to 348 bags. In the reconciliation proceedings, the assessee was able to explain the position of 1849 bags which is much more than the stock found on the spot then, it would not be proper for any person to say that there was discrepancy in

relation to 313 bags. In our considered opinion, the Tribunal was absolutely justified in deleting addition of Rs.1,04,400/- but was not justified in making addition of Rs.94,000/- as the price of the difference between the accounts given at the time of reconciliation and the stock found at the time of the search and seizure. We must also observe that the present is a matter which depended upon a fact finding enquiry and the Tribunal went absolutely wrong in holding against the interest of the assessee. The question referred to us are answered in favour of the assessee and against the interest of the Revenue. The Reference is accordingly disposed of. No costs.

[R. S. Garg, J.]

[D. H. Waghela, J.]

msp